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IN THE

Supreme Court of the United States

October Term, 1979

No.. 79-5602

FEODOR FEDORENKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The undersigned, as counsel for the American Jewish Congress, and the National Jewish Community Relations Advisory Council respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of respondent's assertion that the court below properly revoked petitioner's citizenship. Pursuant to Rule 42, the parties' consent to the filing of the attached brief was sought. The Solicitor General, on behalf of respondent, assented, but Brian M. Gildea, Esq., petitioner's attorney, refused to do so.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through preservation of the rights of all Americans.

The National Jewish Community Relations Advisory Council (NJCRAC) is a coordinating body comprised of eleven national lay Jewish organizations* concerned with American Jewish Community relations and 108 local Jewish Community Councils, including all the major cities in the United States. One of the important goals of NJCRAC is the prosecution of denaturalization cases against alleged Nazi war criminals.

The American Jewish Congress has a long history of combating anti-Semitism both in the United States and abroad. In the years following World War I, as Jews across the European Continent found themselves once again the hapless victims of national frustrations and as virulent anti-Semitism, notably in the form of Nazism, mounted, it began actively to meet the threat which anti-Semitism posed to the Jewish people and world civilization. During and since World War II, the American Jewish Congress and N.J.C.R.A.C. have sought to have world governments bring to justice those responsible for the heinous crimes of the Nazi regime. They have particularly emphasized the need for the Department of Justice to insure that Nazi war

* These organizations are: American Jewish Committee, American Jewish Congress, B'nai Brith—Anti-Defamation League, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America, Women's American ORT.

criminals not find a haven in this country. That Department has instituted a series of lawsuits, of which this is one, designed to deprive Nazi war criminals of American citizenship. A reversal of the decision below would place insurmountable obstacles in the way of that effort. Because the American Jewish Congress and NJCRAC believe that such a result would be intolerable, they seek leave to file this brief.

Respectfully submitted,

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BRIEF OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, *AMICI CURIAE*

Questions Presented

1. Whether petitioner's failure to disclose, in obtaining a visa in 1949, that he had been an armed guard at the Treblinka concentration camp during the Nazi occupation of Poland was a material misrepresentation of fact under 8 U.S.C. § 1451(a).

2. Whether a District Court possesses discretion to excuse a material misrepresentation of fact and to allow a person who procured his naturalization by fraud to retain United States citizenship.

Decisions Below

The opinion of the District Court is reported at 455 F. Supp. 893 (S.D. Fla. 1978). The decision of the United States Court of Appeals for the Fifth Circuit is reported at 597 F.2d 946 (5th Cir. 1979).

Jurisdiction

The judgment of the Court of Appeals was entered on June 28, 1979, and a petition for rehearing was denied on August 15, 1979. Certiorari was granted on February 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Summary of Argument

I. The court below correctly interpreted the second branch of the test established in *Chaunt* v. *United States,* 364 U.S. 350 (1960), as requiring a showing that the petitioner had suppressed facts which might have led to the discovery of facts warranting exclusion. This conclusion is supported by the language and facts of *Chaunt* and the decisions of the lower courts applying that decision. Moreover, the decision below is the only one consistent with the policies embodied in 8 U.S.C. § 1451(a). Any other result would penalize the government for petitioner's misconduct and would make it altogether too difficult for the government to denaturalize a person who had obtained citizenship by concealing material information.

II. The Court of Appeals correctly concluded that the District Court lacked discretion to balance the equities as between the government and petitioner. The statute confers no such authority and the decisions of this Court make clear that none exists. In any event, the District Court erred in its balancing of the equities in this case, for, in concluding that those equities favored petitioner, it in effect concluded that by obeying the law in this country, petitioner had washed his hands of the blood of the victims of Treblinka.

Statutory Provisions Involved

The Immigration and Nationality Act, Section 340(a), 8 U.S.C. § 1451(a), provides:

> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court . . . for the purpose of revoking and setting aside the order admitting such persons to citizenship and cancelling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such cancelling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively; . . . .

The Constitution of the International Refugee Organization of the United Nations, 62 Stat. 3037, T.I.A.S. 1864 (1946), Annex I, Part II, provides that the following persons would not be considered displaced persons:

1. War Criminals, quislings, and traitors.

2. Any other persons who can be shown:

(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations . . . .

The Displaced Persons Act, 62 Stat. 1009, § 2(b), Chapter 647 (1948), provides that

"Displaced person" means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization.

Statement of the Case

This case began in August, 1977 when the United States Attorney for the Southern District of Florida filed an action under 8 U.S.C. § 1451(a) to strip petitioner of his American citizenship. Petitioner was admitted to the United States in 1950, under the Displaced Persons Act (DPA), which provided that persons who had assisted the Nazi regime in the persecution of civilians, or who had voluntarily assisted the enemy forces, were ineligible for admission, *U.S.* v. *Federenko,* 455 F. Supp. 893, 897 (S.D. Fla. 1978).

The government's case against the petitioner had three distinct claims, stated in seven counts in the complaint. Proof of any one of these elements would have sustained the government's case. These claims were (1) actual commission of war crimes or atrocities; (2) willful misrepre-

sentation of facts on the application for a visa, which facts would, if disclosed, have resulted in exclusion; (3) willful concealment of facts which would have been helpful in an investigation, leading to other facts justifying exclusion, *id.* at 897-98. The question presented by this petition concerns only this last aspect of the case. For this reason, although we believe that the District Court's conclusion that the first two claims were not proven is tainted by numerous errors of fact and law, we do not discuss those conclusions in this brief.

The District Court found that petitioner was a Ukrainian serving in the Soviet army who, having been taken prisoner in 1941 by the Germans, was transferred from one prisoner of war camp to another, *id.* at 899. At one, Travnicki, he trained as a guard, although the parties disagree whether he volunteered for that assignment. For a brief period, petitioner served in that capacity at the Poelitz forced labor camp. In September 1942, he was transferred to the extermination camp at Treblinka, *id.* at 899-901.[1]

Petitioner denied having committed atrocities at Treblinka. The District Court credited this testimony, rather than that of the inmates of Treblinka, who identified him as having committed such crimes, *id.* at 901-09.

When Fedorenko applied for admission to the United States under the DPA, his application for admission disclosed only his presence at Poelitz, but not that at Treblinka, and not even the nature of his activities at Poelitz, *id.* at 911. The District Court found that disclosure of Fedorenko's service at Treblinka on the application would

1. The operation of Treblinka is described in greater detail *infra* at 17-20.

have led to an investigation of Fedorenko's service there. That court also found that, ordinarily, disclosure of service or presence at a forced labor camp would have resulted in an investigation, but did not in this case, *id.* at 915.

The government argued that, had Fedorenko disclosed his service as a guard at Treblinka, it would have been able to inquire into the facts and circumstances of that service at a time when it would have been possible to conduct a complete investigation. Despite its finding that full disclosure would have led to an investigation, the District Court held that the government had not met its burden of proof under 8 U.S.C. § 1451(a) because, in its view, the second branch of the test enunciated in *Chaunt* v. *U.S.*, 364 U.S. 350 (1960), required a showing that the facts concealed would ultimately have led to facts which would support denaturalization, 455 F. Supp. at 915-16. In view of its finding that the government had failed to prove such facts, *id.* at 908-09, the District Court concluded that the government had not carried its burden of proof, *id.* at 914-17.

As an alternative basis for its judgment, the District Court held that a denaturalizaion proceeding was an equitable action, that equitable principles were controlling and that those principles required it to balance the equities between the parties, *id.* at 918. Reviewing petitioner's conduct in the United States and balancing it against his activities at Treblinka, the court concluded that it would be inequitable to strip him of his citizenship, *id.* at 920-21.

The Fifth Circuit reversed, *U.S.* v. *Fedorenko,* 597 F.2d 946 (5th Cir. 1979), and ordered that a judgment of de-

naturalization be entered. That court did not review the District Court's factual findings that Fedorenko had not voluntarily committed war crimes or atrocities, or its conclusion that revelation of Fedorenko's service as a camp guard would not have resulted in his exclusion, *id.* at 953. Instead, it rejected the District Court's interpretation of *Chaunt* in favor of a reading more favorable to the government. Specifically, it held that it was sufficient for the government to prove, as the Fifth Circuit concluded that it had, that Fedorenko had suppressed facts on his application for admission which would have been helpful in an investigation of his wartime activities, which investigation *might* have led to the discovery of facts warranting exclusion, *id.* at 949-53. It also held that the District Court did not have authority to balance the equities between the parties. *Id.* at 953-54.

ARGUMENT

POINT I

The Court of Appeals correctly held that the government need not prove that an investigation would have uncovered facts showing an alien to be excludable.

A lie which deprives the United States of the opportunity to make an informed judgment on the admissibility of an alien by aborting a timely investigation of an applicant for admission to the United States is as destructive of the proper administration of the immigration laws as a lie about a fact that would be a ground for exclusion. As interpreted by this Court in *Chaunt* v. *U.S.*, 364 U.S. 350 (1960), the statute under which the government proceeds here, 8 U.S.C. § 1451(a), is a statutory formulation of

that principle. Because the court below properly interpreted the statute in light of *Chaunt*, and properly applied that rule in this case, its judgment should be affirmed.

A. The language of *Chaunt* is unambiguous.

As interpreted by the Court of Appeals in this case, and by all but one of the Circuit Courts that have considered the issue,[2] the second test established in *Chaunt* requires a two-fold showing: (1) that the truth, if disclosed, might have been helpful in an investigation[3] which (2) might have led to the discovery of facts justifying exclusion. It thus rejected the District Court's reading of the *Chaunt* decision, based on what that court believed was an ambiguity in *Chaunt*, 455 F. Supp. at 915-16.

In *Chaunt*, this Court twice stated the elements of the government's case under 8 U.S.C. § 1451(a). The District Court's interpretation was based on this Court's restatement of its holding at the end of its opinion (364 U.S. at 355):

> We only conclude that, in the circumstances of this case, the Government has failed to show by "clear, un-

2. *U.S.* v. *Oddo*, 314 F.2d 115 (2nd Cir.), *cert. denied*, 375 U.S. 833 (1963); *Longhammer* v. *Hamilton*, 295 F.2d 642 (1st Cir. 1961); *In re Haniatakis*, 376 F.2d 728 (3d Cir. 1967); *Kassab* v. *INS*, 364 F.2d 806 (6th Cir. 1966). *Contra*, *La Madrid-Peraza* v. *INS*, 492 F.2d 1297 (9th Cir. 1974); *U.S.* v. *Rossi*, 299 F.2d 650 (9th Cir. 1962).

3. The Fifth Circuit held—and we agree with this analysis—that the government must, under the second branch of the *Chaunt* test, demonstrate that had it had the truth before it, it would have conducted an investigation, not merely that it might have done so. 597 F.2d at 952 n.6. That requirement is met here by the District Court's finding that such an investigation would have occurred, 455 F. Supp. at 915. The reading of *Chaunt* adopted by the court below would not give the Executive Branch untrammeled authority to denaturalize citizens for trivial misstatements, having no contemporaneous significance, made decades previously.

> equivocal, and convincing'' evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

The District Court found this passage ambiguous because it thought that it was not clear what the word ''possibly'' modified.

However, the test was stated earlier in *Chaunt* (364 U.S. at 352-53):

> Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship. Complete replies are essential so that the qualifications of the applicant or his lack of them may be ascertained.

That passage, neither cited nor discussed by the District Court, is unambiguous and supports the interpretation adopted by the Court of Appeals, as that court observed, 597 F.2d at 951.

This analysis is consistent with this Court's holding in *Costello* v. *U.S.*, 365 U.S. 265 (1961). There, Costello failed to disclose his activities as a bootlegger in his petition for naturalization. This Court referred, without passing on their correctness, to a number of lower federal court decisions holding that bootlegging activities were a sufficient basis to deny citizenship, and it concluded that Costello's concealment probably—but not definitely—affected the decision on his application for citizenship. Citing *Chaunt* v.

U.S., supra, 364 U.S. at 352-53, this Court held that that possibility was sufficient to justify denaturalization. On petitioner's view of *Chaunt, Costello* was incorrectly decided.

The District Court's reading of *Chaunt* merges what this Court obviously thought were two alternative criteria for denaturalization into one. In every case under that court's approach, it would be necessary to show the same ultimate fact—that the naturalized citizen concealed facts which would have justified exclusion. Plainly, that was not what this Court intended in *Chaunt.*

B. The facts in *Chaunt* support the decision below.

The Court of Appeals' analysis is the only one consistent with the facts in *Chaunt.* Chaunt, in his application for naturalization, denied ever having been arrested, although he had been arrested for distributing handbills, making a speech in a park and for a breach of peace. This Court found those arrests, at least two of which involved activity presumptively entitled to First Amendment protection, did not support denaturalization.

The government also argued that disclosure of the arrests might have led to discovery of the fact that petitioner was a Communist party official. In finding an insufficient nexus between the arrests and Chaunt's alleged membership in the Communist party, this Court, dealing with the second branch of the *Chaunt* test, noted that Chaunt had disclosed his membership in the International Workers' Order (IWO), a Communist-controlled organization. Since no investigation was undertaken as a result of that disclosure—one more likely to have led to the discovery of

Chaunt's relationship to the Communist party—this Court rejected the government's claim that the facts concealed were material.

The failure of the government's proof in *Chaunt* was not its failure to prove that petitioner was a Communist. Nothing in this Court's opinion suggests that such a finding was a necessary predicate to the inquiry. On the contrary, the question of whether Chaunt was a Communist was not before this Court.[4] Rather, the defect in the government's case was the failure to demonstrate that the concealed facts would have instigated an investigation of Chaunt or would have constituted evidence in such an investigation.

Petitioner argues that, since his application acknowledged his presence at the Poelitz forced labor camp, and the government's own expert testified that that disclosure would ordinarily have resulted in an investigation—although it did not in Fedorenko's case—the additional disclosure of his service at Treblinka was not material, just as the concealment of Chaunt's arrest record was immaterial in light of the disclosure of his IWO membership.

The analogy fails. The *Chaunt* Court stressed that the concealed facts did not involve either moral turpitude or activities which would "even peripherally" indicate a disqualification for citizenship and that a very different case would be presented by the concealment of a fact, such as service as a guard at Treblinka, which did.

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4. In remanding that case, this Court ordered the Court of Appeals to consider that factual question, which was relevant to a determination of whether the government had carried its burden under the first branch of the test, 364 U.S. at 151.

Second, this Court in *Chaunt* treated the non-disclosure of the arrests as immaterial because facts of much greater significance were disclosed. Here, by contrast, petitioner disclosed facts of lesser significance—presence at a forced labor camp—and argues that the failure of the government to investigate those facts proves that it would not have investigated facts of far greater significance—service at the "human abattoir"[5] that was Treblinka. Not only is this argument illogical, but even on its own terms it ignores the real possibility that the cumulative effect of the disclosure of Fedorenko's service at Poelitz and Treblinka would have shed a different light on his service at Poelitz.[6] And, unlike Chaunt's disclosure of IWO membership, Fedorenko's disclosure concerning Poelitz was not complete, for it did not reveal that he served as a guard there.

But, more importantly, this argument flies in the face of the District Court's finding, accepted by the Court of Appeals, that had Fedorenko disclosed his service at Treblinka an investigation would have taken place. That investigation would have looked not merely at a remote link in an evidentiary chain leading to other facts which would have justified exclusion, as in *Chaunt;* rather, the concealed facts themselves would have both instigated, and been the focus of, an investigation designed to determine the precise nature of petitioner's activities at Treblinka. Those activities cannot remotely be compared to the matters concealed in *Chaunt.*

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5. The phrase is the District Court's, 455 F. Supp. at 901 n.12.

6. While it is arguable that, under the DPA, petitioner's service at Poelitz was alone sufficient to justify exclusion, petitioner is in no position to complain that the government was willing to overlook that service, but not his service at Treblinka.

C. The decision below comports with the purposes of 8 U.S.C. § 1451(a).

Because of the passage of time, the government will often not be able to make out a case for denaturalization under the first branch of the *Chaunt* test. A rule which required the government to prove, under the second branch of *Chaunt*, facts justifying denaturalization, would provide an applicant with a powerful incentive to conceal facts detrimental to the granting of the application. As the Court of Appeals put it, 597 F.2d at 951, petitioner's interpretation of *Chaunt* would give applicants "everything to gain and nothing to lose by lying under oath to the I.N.S."

This case illustrates the difficulties faced by the government in trying to reconstruct what Fedorenko did some 35 years ago. The shortcomings that the District Court found in the government's proof that Fedorenko had voluntarily engaged in activities justifying exclusion would not have existed had a timely investigation occurred. Thus, for example, the District Court denigrated the survivor witnesses' credibility because they were testifying to events that had occurred over a third of a century earlier. It commented adversely on the absence of the vice-consul who passed upon Fedorenko's application. It noted the absence of documentary evidence. 445 F.Supp. at 902, 905, 907-08, 911.

As this Court has noted in the speedy trial context, *Barker* v. *Wingo*, 407 U.S. 514, 519-21 (1972), delays in prosecuting criminal cases often result in the destruction of evidence to the prejudice of the government, the defendant and the public. Such prejudice is inherent in all of the

denaturalization cases brought against Nazi war criminals. The handful of inmates of the Nazi concentration camps who survived have scattered to various parts of the world. Many have died. Some who have succeeded in forgetting the horrors through which they lived are understandably unwilling to recall those horrors, even to assist in the prosecution of their oppressors. Documentary evidence which might have been available is now destroyed, lost in obscure archives, or unreachable behind the Iron Curtain. *See generally, U.S.* v. *Walus,* 616 F.2d 283, 303-04 (7th Cir. 1980). *See also,* Remarks of Attorney General Benjamin Civiletti, reprinted in 126 CONG. REC. E 2004 (April 23, 1980) (Daily Edition) (Remarks of Rep. Holtzman).

The delay here is attributable solely to petitioner. It was his lie which prevented the United States from making a timely investigation of his activities. It was his lie which lulled the United States into admitting him. It was his lie which is responsible for the delay which is now used to question the credibility of the survivors of Treblinka, as well as the government's failure to produce documentary evidence. It is outrageous that petitioner, having erected by his lie these obstacles to the government's case, now argues that the government must prove that he was excludable. It is—and ought to be—sufficient that the government has demonstrated the real and substantial possibility that the facts suppressed might have been helpful in a timely investigation.

The incentive to lie inherent in the holding of the District Court, however, is not the only deficiency in its approach. That approach fundamentally misconceives a court's role in a proceeding such as this. Congress, acting

under the plenary authority conferred on it by Article I, § 8, cl. 4, has entrusted the Judicial Branch with the responsibility for determining who shall be admitted to citizenship and for policing the integrity of those determinations.

The function of the court in an 8 U.S.C. § 1451(a) proceeding, similar to the court's role under Fed. R. Civ. P. 60(b)(3), is to set aside a judgment awarding citizenship which is procured by fraud, *U.S.* v. *Ness,* 245 U.S. 319 (1917); *Johanssen* v. *U.S.,* 225 U.S. 227 (1912).

The Fifth Circuit's reading of *Chaunt* is consistent with the practice under Rule 60(b)(3), under which a party need show only that it was denied, as a result of the other party's fraud, a full and fair opportunity to present its case, and not that a different result would necessarily have obtained, *see Toledo Co.* v. *Computing Co.,* 261 U.S. 399, 421 (1923); *Rozier* v. *Ford Motor Co.,* 573 F.2d 1332, 1339 (5th Cir. 1978); *Assman* v. *Fleming,* 159 F.2d 332 (8th Cir. 1947).

Moreover, as the Court of Appeals noted, 597 F.2d at 951 n.4, when Fedorenko applied for admission to the United States, Section 10 of the DPA, 62 Stat. 1013, placed the burden on him to prove eligibility. In a denaturalization proceeding, by contrast, the government bears the burden of proving its case by "clear, convincing and unequivocal evidence." *Chaunt* v. *U.S. supra,* 364 U.S. at 353. As this Court has held in the criminal context, the question of who bears the burden of proof is often crucial to the outcome of a case, *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975). Thus, if only the limited facts concerning the precise nature of Fedorenko's wartime activities before

the District Court in 1978 were before the vice-consul in 1949, the vice-consul could reasonably have concluded that Fedorenko had failed to carry his burden of proof. Now that Fedorenko has shifted the burden of proof by his lie to the United States, the government is, according to the petitioner, unable to exclude him because it is unable to carry its burden of proof. *Chaunt* cannot be read to permit such a result.

D. The Court of Appeals did not intrude on the District Court's role as finder of fact.

Contrary to petitioner's claim (Brief for Petitioner at 19-20), the Fifth Circuit did not improperly substitute its evaluation of the facts surrounding his activities at Treblinka for that of the trial court. Under the reading given to *Chaunt* by the court below it was not necessary for it to decide—nor did it—whether Fedorenko had committed war crimes or atrocities. Rather, having determined that the District Court had announced an erroneous legal standard, the Fifth Circuit applied the correct standard to the undisputed fact that petitioner had concealed his service at Treblinka. That fact alone, it concluded, as it had to under *Chaunt*, was sufficient to require denaturalization.[7]

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7. *Vasques-Mondragon* v. *INS*, 560 F.2d 1225 (5th Cir. 1977), cited by petitioner (Brief for Petitioner at 19), is irrelevant to the case at bar. There, the decision reviewed depended on the correctness of the factual findings made by an Immigration Judge. The Fifth Circuit held that a reviewing court was required to defer to the factual findings made by that officer. Here, however, the question is not whether Fedorenko can now be proven to be a war criminal, but whether his concealment of facts relevant to the inquiry was material under the second branch of the *Chaunt* test, a question of law on which the Court of Appeals was not bound by the lower court's conclusion.

In any event, it is well settled that findings of fact tainted, as were the findings here, by errors of law are not accorded the same deference as other findings of fact. 5A Moore's FEDERAL PRACTICE, ¶ 52.03[2] n.4 and cases cited.

The conclusion that an investigation might have disclosed information about Fedorenko justifying a denial of entry under the DPA follows inevitably from the known facts, some of which are recited in the District Court's opinion, 455 F. Supp. at 901 n.12, about the operation of Treblinka, and particularly the role of Ukrainian guards there.

The Treblinka extermination camp opened in July 1942, only two months before Fedorenko's arrival, and closed shortly after an inmate revolt in August 1943. In that brief period, approximately 750,000 persons were murdered at Treblinka. Unlike some other concentration camps, Treblinka served only as a facility for mass murder. Virtually every man, woman and child arriving there was killed, usually immediately upon arrival. The few not killed immediately were used to sort the victims' belongings and to burn their bodies after the gold fillings had been extracted from their teeth. Only a very few persons, chiefly those who escaped during the revolt in August 1943, survived to tell about Treblinka. *Treblinka,* 15 ENCYCLOPEDIA JUDAICA 1364.

Murder was reduced to a science at Treblinka. The victims arrived in cattle cars, chiefly from the Polish ghettos, but from other countries in occupied Europe as well. Driven from the cars, the men were separated from the women and children; all were forced to undress and hand over their valuables. The victims were then driven either to the lazaret or to the gas chambers, which were disguised as shower rooms. 455 F. Supp. at 901 n.12. Urged on by comments such as "the water is getting cold," the victims entered a narrow path variously known as the "tube," "Ascension Boulevard" (*Himmelfahrtsallee*) or

"the road without return," *id.*; ENCYCLOPEDIA JUDAICA, *supra.*

> With hands raised above their heads, the victims were driven with canes and whips through the "tube" and into the gas chambers; the capacity of the chambers was utilized to the fullest. After the doors were closed, the order to start the motor was given by calling "Ivan, water!"—Ukrainians ran the motor. The gassing took 30 to 40 minutes, then the doors were opened and the removal of the bodies began.[8]

Although Treblinka was a factory for the production of death on a mass scale, the staff was quite small. A West German trial court, reviewing the evidence presented to it in connection with the trial of some of those responsible for Treblinka's operation, wrote:

> During the last months of the year 1942, . . . there were approximately twenty Germans in the camp. All of them wore the uniform of the Waffen-SS regardless whether they were members of the SS, belonged to a police unit, or were only . . . attached to it. They were armed with pistols . . . . At the end of 1942 the guard units (*Wachmannschaften*) in the camp were made up of 100-200 Ukrainians. In contrast to the Germans, the Ukrainians wore the black uniforms of the General-SS and were armed with carbines.[9]

These findings are in essential agreement with those of the trial court here.

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8. Ino Arndt and Wolfgang Scheffler, "Organisierter Massenmord an Juden in nationalsozialistischen Vernichtungslagern," in Vierteljahrshefte für Zeitgeschichte 24, 277-78 (1976); ENCYCLOPEDIA JUDAICA, *supra*, at 1368-69.

9. Trial of Josef Hirtreiter: *Justiz und NS-Verbrechen* VIII No. 270, p. 263.

Another West German court in a later and larger Treblinka trial found:

> The staff of the Treblinka camp, which was responsible for the smooth execution of the mass exterminations, consisted of ca. 35 to 40 Germans, all of whom wore the field-grey uniform of the Waffen-SS . . . . Aside from this German staff, there were ca. 90 to 120 Ukrainian voluntary auxiliaries . . . at the camp. They were primarily assigned to guard duty, but in addition they were to a certain extent also detailed to the killing operations. In contrast to the Germans, they wore black uniforms, were armed with carbines and rifles, and a great majority also carried long leather whips, partly also bayonets.[10]

These findings suggest that persons in Fedorenko's position served voluntarily and were routinely assigned to tasks connected with those genocidal operations. This last fact is particularly significant because several witnesses testified that Fedorenko in fact participated in such atrocities, 455 F. Supp. at 901-03.

More important than the specific differences between these findings and Fedorenko's story—all of which support the conclusion of the court below that an investigation made when Fedorenko applied for citizenship might have led to facts justifying exclusion—is the almost inescapable conclusion that, given the small German staff at Treblinka,

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10. Trial of Kurt Franz and others: Landgericht Düsseldorf, 3 September 1965, 8 I Ks 2/64 in Ns-Vernichtungslager im Spiegel deutscher Strafprozesse, ed. Adalbert Rückerl (Munich 1977) pp. 207-08. For further evidence of a similar nature, see Hearings Before the House Committee on Foreign Affairs on Punishment of War Criminals, 79th Congress, 1st Session, on H. J. Res. 93; Y. Suhl, THEY FOUGHT BACK: THE STORY OF JEWISH RESISTANCE (1967).

the presence of Ukrainians such as Fedorenko was indispensable if the 'production' of the Treblinka death factory was to continue. Perhaps Fedorenko could have shown that he did not aid in the mass murder perpetrated at Treblinka. But just as surely, the United States was entitled to a fair chance to prove the more likely hypothesis —that Fedorenko is a mass murderer.

POINT II

The court below correctly held that the District Court erred in holding that it could deny denaturalization because of equitable considerations.

A. District Courts have no power to deny denaturalization on the basis of the equities.

The court below correctly concluded that the District Court had no authority to weigh equitable considerations in deciding whether to award a judgment of denaturalization. The availability of such discretion is not an open question. In *U.S.* v. *Ginsberg,* 243 U.S. 472, 474 (1917), this Court squarely rejected the existence of such a power:

> An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by the Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

Accord, *Rogers* v. *Bellei,* 401 U.S. 815, 830 (1971); *U.S.* v. *Ness, supra; Maney* v. *U.S.,* 278 U.S. 17, 22-23 (1928).

The very language of the statute compels this result, for it directs that courts "shall" enter judgments of denaturalization when the government carries its burden of proof. The decision below fully comports with this Congressional use of the word "shall," which, when directed to the judiciary, is ordinarily mandatory, 2A SUTHERLAND'S STATUTORY CONSTRUCTION, § 57.16 (Sands Edition, 1973).

Petitioner asserts that the holding in *Luria* v. *U.S.*, 231 U.S. 9, 27-28 (1913), to the effect that a denaturalization proceeding is "essentially equitable," supports the District Court's invocation of equity power. The holding in that case, however, was merely that a denaturalization proceeding is not one at "common law" within the meaning of the Seventh Amendment. It was a procedural holding only, and not one governing the substantive law to be applied. The power to determine the substantive law of naturalization is vested by the Constitution in the Congress, which, as this Court emphasized in *U.S.* v. *Ginsberg, supra,* has determined not to accord the courts discretion in 8 U.S.C. § 1451(a) proceedings.

Finally, the Fifth Circuit was plainly correct in rejecting petitioner's attempt to analogize a denaturalization proceeding to one granting citizenship despite allegations of moral turpitude, 597 F.2d at 954:

> In the former situation, the court must consider facts and circumstances relevant to determining whether an individual meets such requirements for naturalization as good moral character and an understanding of the English language, basic American history, and

civics . . . . The district courts must be accorded some discretion to make these determinations. *See, e.g., Petition of R.*, 1944, D. Mass., 56 F.Supp. 969. Once it has been determined that a person does not qualify for citizenship, however, the district court has no discretion to ignore the defect and grant citizenship. *United States* v. *Ginsberg*, 1917, 243 U.S. 472, 474. The denaturalization statute, 8 U.S.C. § 1451, does not accord the district courts any authority to excuse the fraudulent procurement of citizenship . . . .

B. No. weight should be given to Fedorenko's conduct in this country.

Even if discretion exists, however, we believe that the District Court improperly exercised that discretion in this case. The equity found to favor petitioner in this case was an unblemished record in this country. Nothing less, of course, could be expected of a person with petitioner's background. Plainly, no former concentration camp guard who has succeeded in finding refuge in this country would proclaim his admiration of Hitler. Neither would he engage in questionable activities that might prompt an investigation into his past.

If the sort of unblemished record apparently compiled by Fedorenko is a factor to be considered in determining whether to denaturalize him, a further burden is imposed on the government's ability to police the availability of that precious commodity which is American citizenship. The government would not only have to bear the burden of proving years later that petitioner was originally excludable, but that his good behavior in the interim was not sufficient to outweigh that misconduct. This Court rejected

the significance of post-application conduct in *Costello* v. *U.S., supra,* 365 U.S. at 283. There, this Court was unwilling to excuse misstatements on petitioner's application for naturalization based on his 65 years of residence in this country. It did so not because it felt that that fact was outweighed by Costello's misdeeds, but because it was legally irrelevant.

Whether or not Fedorenko can be shown to have personally participated in atrocities, it cannot be disputed that his service at Treblinka facilitated such activities and that his lie has made it difficult for the government to determine what he did do there. But, as a German court put it in a case involving officials of another concentration camp:

> It cannot be proved that any of these nine defendants killed Jews with his own hands or that he caused on his own initiative Jews to be killed. On the other hand, wherever they were employed within the camp structure they aided and abetted the mass murder of the Jews, and through their functional collaboration in the immediate proximity of the deed helped make it possible.[11]

Petitioner's hands are not merely unclean in the usual equitable sense. They were and still are unclean with the blood of the victims of Treblinka. The District Court's determination that that blood has been washed out by petitioner's self-serving good conduct is nothing less than obscene. It should be repudiated by this Court.

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11. Sobibor Trial, Hagen District Court, Landgericht Hagen, 20 December 1966, 11 Ks 1/64, in Ns-Vernichtungslager im Spiegel deutscher Strafprozesse, *supra* n.10, p.310.

Conclusion

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

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